Nos. 90-29 and 90-38
(Consolidated)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS, *et al.*,
Petitioners,

v.

DANIEL L. MEDLOCK, *et al.*,
Respondents.

DANIEL L. MEDLOCK, *et al.*,
Petitioners,

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF DANIEL L. MEDLOCK, ET AL.

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JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS, *et al.*,
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The National Association of Broadcasters and the Association of Independent Television Stations, Inc., with consents of the parties, submit this brief *amici curiae* in support of Daniel L. Medlock, *et al.*, Petitioners in No. 90-38 [hereinafter referred to as "Taxpayers"].

INTERESTS OF AMICI

The National Association of Broadcasters (NAB) is a nonprofit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's radio and television stations and all the major networks.

The Association of Independent Television Stations, Inc. (INTV) is a nonprofit association of independent television stations, television stations not primarily affiliated with the three established national television networks. INTV promotes the interests of independent television stations.

This case presents two issues of critical concern to *amici* and their members. Taxpayers have asked the Court to decide the nature and scope of the protection afforded cable television by the First Amendment. Broadcast television stations compete with cable systems in the provision of video programming to the public and in the sale of advertising, as well as being the source of the most popular programming on cable systems. The environment in which broadcast stations and cable systems compete has largely been defined by regulations, statutory and administrative. *Amici*, therefore, are heavily involved in legislative, regulatory, and judicial proceedings concerning the regulation of cable television and the video marketplace. Often, cable operators' First Amendment status has been a significant issue in these proceedings and *amici* therefore have a vital interest in any resolution of that issue.

The broadcast stations which are members of NAB and INTV also have a vital interest in protecting their own First Amendment interests in not being subjected to discriminatory taxes. *Amici* consequently are interested in ensuring that the protections afforded the press in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), are not curtailed.

SUMMARY OF ARGUMENT

The Court should decline the invitation presented by Taxpayers to make a determination of cable television's precise status under the First Amendment. That cable operators are First Amendment speakers has not been in doubt since *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), and this case can and should be resolved according to established First Amendment principles applicable to all members of the press. It is unnecessary and would be inappropriate for the Court to anticipate questions of cable operators' First Amendment rights that may be presented in other cases dealing with cable television's unique status and characteristics, cases in which—unlike the case at bar—a full record will be developed to aid the Court in resolving the question it left open in *Preferred*: whether cable television should be treated for First Amendment purposes like broadcasting, or the print media, or another formulation distinctive to cable television.

The decision of the Arkansas Supreme Court would vitiate the principle determined in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), that the First Amendment prohibits states from imposing taxes which single out the press or which apply different standards to the taxation of the media. The electronic media are no less entitled to this protection than are newspapers and magazines; indeed, the Court in varied contexts has consistently recognized that broadcasters and other electronic publishers are equally part of the press. State court decisions following *Minneapolis Star* have agreed that differential treatment of the electronic press is barred by the First Amendment. Arkansas has advanced no compelling justification for singling out cable television for taxation, and the tax before the Court should be found to violate the First Amendment.

ARGUMENT

I. THE SCOPE OF THE FIRST AMENDMENT RIGHTS OF CABLE TELEVISION OPERATORS NEED NOT BE ADDRESSED IN THIS CASE

Despite Taxpayers' request that it do so,[1] the Court in this case should refrain from deciding the precise nature and degree of protection afforded cable television by the First Amendment—an issue left open in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986); *id.* at 496-97 (Blackmun, J., concurring). Contrary to Taxpayers' contentions, it is neither necessary nor appropriate for the Court to address this issue in resolving the instant case. *Amici* urge the Court to leave the issue of the proper First Amendment standard applicable to cable regulation to a case which both presents the issue squarely and in which an adequate record on the issue has been developed.

First, the level of cable operators' First Amendment rights is not dispositive of this case and, therefore, should not be reached. As discussed in Argument II, *infra*, a determination of the validity of the Arkansas tax at issue does not depend on a precise evaluation of the First Amendment status of cable television. In *Preferred*, the Court recognized that the activities of cable operators "seem to implicate First Amendment interests as do the activities of wireless broadcasters." 476 U.S. at 494; *see FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (recognizing some exercise of editorial discretion by cable operators in selecting programming). No further delineation of cable operators' First Amendment posture is needed to decide this case.

It is established that "[t]he Court will not 'anticipate a question of constitutional law in advance of the neces-

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[1] Taxpayers' Petition for Certiorari at 19-24.

sity of deciding it.'" *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring), *quoting Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioners*, 113 U.S. 33, 39 (1885). Following this principle, the Court should not now proceed beyond its holding in *Preferred* that cable operators are, at least for some purposes, First Amendment speakers.

Second, defining cable television's First Amendment status would be particularly inappropriate in this case because the facts concerning this issue were not developed sufficiently in the record below. Nothing more than generalized descriptions of the activities of cable system operators appear to have been placed into the record before the Arkansas Chancellor, and neither opportunity nor occasion arose below for any detailed exploration of the implications of according cable operators a particular standard for judging intrusions on their free speech interests. In *Preferred*, a case which turned directly on the level of First Amendment protection which cable systems could claim, this Court declined to rule on that issue because of the inadequate record presented.

> "We think that we may know more than we know now about how the constitutional issues should be resolved when we know more about the present uses of the public poles and rights-of-way and how respondent proposes to install and maintain its facilities on them." [2]

The record in this case provides no answers to the questions which the Court determined in *Preferred* should be addressed prior to its discussion of the constitutional standard which should be applied to cable regulation. The Court should decline to consider the issue until a case is presented in which the record necessary to properly evaluate cable operators' free speech interests has been assembled.

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[2] 476 U.S. at 495.

A decision settling the scope of cable operators' First Amendment rights would have broad implications. The issue affects both local regulation of cable systems [3] and federal statutes and regulations concerning the role of cable systems in the video and information market.[4] Taxpayers indeed allude to this in asserting that the Court should make a comprehensive determination of the rights of cable operators as "guidance" to Congress in addressing cable regulation. Taxpayers' Petition for Certiorari at 22 n.11. Of course, it is not the function of this Court to give advisory opinions to Congress on the scope of its authority in a particular area. *E.g.*, *Ashwander*, 297 U.S. at 345-46 (Brandeis, J., concurring); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

Justice Blackmun wrote in *Preferred*:

> "Different communications media are treated differently for First Amendment purposes . . . In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis." [5]

As cable television becomes more pervasive,[6] the need to

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[3] *See, e.g., Preferred Communications, Inc. v. City of Los Angeles*, No. CV 83-5846 (CBM) (C.D. Cal. Aug. 24, 1990) (constitutionality of local cable franchise requirements).

[4] *See, e.g., Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir.), *clarified*, 837 F.2d 517 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988) (local signal carriage regulations); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (local signal carriage regulations); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (program siphoning regulations).

[5] 476 U.S. at 496 (Blackmun, J., concurring).

[6] The growth of cable television has been dramatic. In 1975, only 14 percent of television households received cable service. *The*

determine the level of First Amendment protection which cable operators may claim will grow. Further challenges to municipal regulation of existing cable systems will arise and decisions will be made concerning entry of potential competitors to such systems. Regulations intended to integrate cable television with other communications media may be adopted, for example, by ensuring even-handed access for local television stations to households which receive their video signals from cable. Rather than addressing the constitutional rights of the cable medium here where that issue is at best tangential, the Court should defer consideration of the extent of cable television's First Amendment interests for a case in which that issue is dispositive.

II. THE FIRST AMENDMENT'S BAR ON TAXES WHICH SINGLE OUT THE PRESS EXTENDS TO THE ELECTRONIC MEDIA TO THE SAME EXTENT AS THE PRINT MEDIA

Arkansas contends that the greater level of regulation permitted for cable television services, such as the requirement of a local franchise, and the use of public rights of way to deliver cable services permits the State to impose a unique tax burden on cable operators. Presumably, Arkansas also would argue that the regulated status of other electronic media empowers the State to exact taxes addressed to those media only, or which place a differential burden on those media.

The Supreme Court of Arkansas, while disagreeing with the State's virtual exclusion of the electronic media from the protection the First Amendment affords against burdensome taxation of the press, narrowly construed

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Kagan Media Index, Oct. 22, 1990, at 2. Today, cable passes 92 percent of all television households and basic cable has a penetration rate of almost 60 percent of passed homes. *Id.* at 6. The majority of television households, therefore, now receive their video service from a cable operator.

the State's obligation to permit it to tax particular segments of the media if an identical tax were imposed upon another medium providing what the court viewed as essentially identical services to the public. Taxpayers' Petition for Certiorari at 7a. This Court's decisions provide no support for either proposition, and endorsement of the Arkansas cable tax either as initially enacted or as amended would vitiate the protection the Court has found the First Amendment provides against discriminatory taxation of the press.

In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), the Court struck down a state tax which applied only to certain newspapers. It held:

> "When the State singles out the press, . . . the political restraints that prevent a legislature from passing crippling taxes of general applicability are weakened and the threat of burdensome taxes becomes acute. . . . Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." [7]

Nothing in the *Minneapolis Star* opinion suggests that the Court's ruling was limited to newspapers or the print media. There is no basis to conclude that states are free to single out one medium for different tax burdens than others without demonstrating a compelling need for such differentiation.

Indeed the Court's focus in *Minneapolis Star* on the difficulty courts have in assessing claims of the relative burdens of different tax schemes [8] supports the view that differential tax burdens among media are no more ac-

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[7] 460 U.S. at 585.

[8] *Id.* at 589-90.

ceptable than disparate treatment of particular users of one medium. Certainly, the effect of special treatment of one class of speaker within a medium or of special treatment of the press generally would be far easier to assess with precision than the effect of different tax schemes for distinct types of media. The Court's subsequent decision in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), demonstrates that the rule in *Minneapolis Star* was not limited to newspapers, since the latter case held invalid a tax which distinguished between types of magazines.

The courts, including this Court, have long recognized that the "press" includes both the print and electronic media. "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lowell v. City of Griffin*, 303 U.S. 444, 452 (1938). In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110 (1973), the Court concluded that "Congress intended to permit private broadcasting to develop with the widest jouralistic freedom consistent with its public obligations."

The Court also has recognized in other contexts that the term "press" for First Amendment purposes fully includes the electronic media. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court held that the First Amendment interest in a vigorous press precluded a state from imposing civil liability for the broadcast of information contained in public records. Similarly, First Amendment protections for the press from certain defamation actions apply to the electronic media in the same manner as they do to the print press. *See, e.g., Herbert v. Lando*, 441 U.S. 153 (1979); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 32 n.3 (1971).[9]

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[9] *See also Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 110 (1979) (Rehnquist, J., concurring) (statute imposing criminal sanc-

Where the Court has adopted a more restrictive view of the First Amendment for electronic media, it has always been in the context of regulation which directly relates to the unique role of the particular medium at issue. *See, e.g., Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).[10] Arkansas' contention that the validity of one type of regulation of a medium virtually eliminates First Amendment protection for that medium finds no support whatever in this Court's decisions.

The state court decisions following *Minneapolis Star* are to the same effect. In striking down a tax similar to the one at bar applied to a subscription television service, the California Court of Appeal held that "[t]here is no doubt that Premier, as a disseminator of motion pictures, news, and other information and entertainment programming, engages in conduct protected by the First Amendment." *City of Alameda v. Premier Communications Network, Inc.*, 156 Cal. App. 3d 148, 152, 202 Cal. Rptr. 684, 686 (Cal. Ct. App.), *cert. denied*, 469 U.S. 1073 (1984). In *McGraw-Hill, Inc. v. State Tax Commission*, 75 N.Y.2d 852, 552 N.E.2d 163, 552 N.Y.S.2d 915 (N.Y. 1990), the court adopted a lower court decision holding unconstitutional a method of calculating income subject to tax which was applied differently to broadcasters than to magazines. The court concluded that it is presumptively unconstitutional to single out any part of the press for taxation, and rejected the state's argument that the greater level of regulation permitted for the broadcast media authorized different tax treatment. That electronic media may be more susceptible to government regulation,

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tions on newspapers unconstitutional because it did not apply to broadcast stations).

[10] Note, however, that in *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984), the Court suggested that the scarcity rationale permitting certain regulation of broadcasters may have little continuing vitality.

the lower court held, "fails to show any compelling state interest in taxing the two types of media differently." *McGraw-Hill, Inc. v. State Tax Commission*, 146 A.D.2d 371, 541 N.Y.S.2d 252, 255 (N.Y. App. Div. 1989).

In an Oklahoma case involving a sales tax scheme resulting in a different level of burden being placed on broadcasters than on the print media, the Supreme Court of Oklahoma also concluded that the regulation of broadcasting due to its use of spectrum did not authorize the state to subject broadcasters to different tax burdens. The Court stated:

> "Both *Minneapolis Star* and *Ragland* found *First Amendment* violations resulting from a differential tax scheme between different members of the press. Though both *cases* admittedly dealt with differential treatment between members of the *print* media, there is nothing to suggest that this court should, without sufficient justification, approve preferential treatment of the print media over the broadcast media, where both are members of the press. The First Amendment guarantees freedom of the press—not just the *printed* press."

Oklahoma Broadcasters Association v. Oklahoma Tax Commission, 789 P.2d 1312, 1316 (Okla. 1990).

In the present case, cable television systems in Arkansas provide, as the Court determined in *Preferred*, a medium for the transmission of information and opinion. While cable systems may not be entitled to the same degree of First Amendment protection as newspapers or magazines or broadcast stations, the above authorities make clear that cable, as a part of the press, is entitled to the protection of the First Amendment from discriminatory taxation. Were the narrow view of the Arkansas court to be accepted in this case, the evil which the Court identified in *Minneapolis Star*—using taxes to punish or restrict expression—would be permitted to any state careful enough to place the discriminatory tax on all

users of a particular medium. *Amici* urge the Court to reject such a dangerous interpretation of the First Amendment.

A state which assesses a tax on the media or which creates a distinct burden only on particular media must be required to demonstrate a compelling state interest requiring the differential treatment.[11] No such reason has been advanced by Arkansas in this case; indeed, its primary argument appears to be that cable systems might have been subjected to the gross receipts tax even absent the passage of the enabling provision in question. At most, this can be interpreted as relating to the State's interest in raising revenue, an interest which *Minneapolis Star* concluded is inadequate to justify differential taxation of the press. 460 U.S. at 586.

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[11] Arkansas argues that differential taxes should be evaluated under the standard of *United States v. O'Brien*, 391 U.S. 367 (1968). The use of *O'Brien* in this context is mistaken. The *O'Brien* test by its own terms is used to determine whether "a sufficiently important governmental interest in regulating the nonspeech element [of the conduct addressed in a regulation] can justify incidental limitations on First Amendment freedoms." *Id.* at 376. There is no nonspeech element of cable service which the Arkansas tax is intended to control. The balancing of interests required by *O'Brien* is therefore not called for; taxes which discriminate against the media are presumed unconstitutional unless the state can demonstrate a compelling interest requiring the unequal treatment.

CONCLUSION

For the foregoing reasons, the National Association of Broadcasters and the Association of Independent Television Stations, Inc. urge the Court to refrain from deciding the precise scope of protection afforded cable television by the First Amendment and to hold the Arkansas gross receipts tax on cable television an unconstitutional burden on the right of a free press guaranteed by the First Amendment.

Respectfully submitted,

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